2016

Sate of Utah, Plaintiff/Respondent, vs. Desean Michael Goins, Defendant/Petitioner.

Utah Supreme Court

IN THE UTAH SUPREME COURT

STATE OF UTAH,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	Case No. 20160485-SC
	)	
DESEAN MICHAEL GOINS,	)	
	)	
Defendant/Petitioner.	)	

REPLY BRIEF ON CERTIORARI TO THE UTAH COURT OF APPEALS

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THE DEFENDANT IS PRESENTLY INCARCERATED IN THE UTAH STATE PRISON.

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POINT I

ESTRADA WAS UNAVAILABLE BECAUSE THE STATE FAILED TO MAKE A REASONABLE EFFORT TO OBTAIN HIS PRESENCE AT TRIAL.

Both the State and Petitioner acknowledge that to admit prior testimonial type statements, a two-pronged test must be employed. "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004).

As to the first prong, unavailability, the court of appeals decision in *State v. Goins*, 2016 UT App 57 indicates that while the State must make "every reasonable effort to procure the witness," he need not "be tracked to ends of earth" citing *State v. Menzies*, 889 P.2d 393, 402 (Utah 1994); *Poe v. Turner*, 490 F.2d 329, 331 (10th Cir. 1974). *Goins* at ¶¶ 9-10, 14. The court of appeals drew a distinction between *State v. Drawn*, 791 P.2d 890, 893 (Utah Ct. App. 1990), St's Br. 11, 18, and *State v. Chapman*, 655 P.2d 1119, 1122 (Utah 1982), where efforts to obtain a witness were lacking.

The State has the burden to establish that "every reasonable effort to procure the witness" was brought to bear. *State v. Barela*, 779 P.2d 1140, 1142-43 (Utah Ct. App. 1989); *State v. Montoya*, 2004 UT 5, ¶ 16, 84 P.3d 1183.[1] It is neither the Petitioner's burden to establish that conventional means of service and compliance with UT R. Crim. P. 14 would have been more effective nor that the State effectively brought to bear its considerable resources. Petitioner does not disagree with the State that "service of a

[1] For a thoroughgoing analysis of the authorities uniformly establishing the prosecution's burden to establish unavailability see *State v. Abreu*, 837 So. 2d 400 (Fla. 2003).

subpoena is not a mandatory prerequisite to a finding of unavailability." St Br. p. 15. Note, however, the lengths to which the prosecution went in *Ohio v. Roberts*: "But the service and ineffectiveness of the *five subpoenas and the conversation with Anita's mother* were far more than mere reluctance to face the possibility of a refusal." *Ohio v. Roberts*, 448 U.S. at 76, 100 S. Ct. at 2544 (emphasis added). The service of five subpoenae and discussing the witness whereabouts with her parents constituted a "reasonable effort." Contrasted with e-mailing a mutual friend and assuming that what he reported to the prosecutor was entirely accurate, the prosecution's effort in the instant case does not amount to such a "reasonable effort."

The State takes the position that "Goins has not established that service by "conventional means" was even possible." St. Br., p. 20. This reverses the burden of proof. It is the State's burden to establish unavailability, not the defendant's burden to show that it was possible. 779 P.2d 1140, *supra*, 1142-43; *State v. Montoya*, 2004 UT 5, *supra*, ¶ 16, 84 P.3d 1183. And notwithstanding the State's assertion to the contrary that "the issue is not whether additional avenues of service were available" is irrelevant, St. Br. p. 20, in assessing whether "every reasonable effort" was made to procure attendance of the witness, what the State failed to do in view of other potentialities is certainly relevant to the determination. Additionally, Petitioner never maintained that formal service of process and a return was required as the State asserts. St. Br. 19-20. Only that the absence of traditional reliable means is one of the factors which should be taken into consideration in determining whether reasonable efforts were used to obtain the presence of the witness.

The State indicates several times, and it is not disputed, that counsel for Goins accepted the prosecutor's proffer of facts regarding what he had done to procure attendance of Estrada. St. Br. 9, 21. That does not equate to defense counsel agreeing that those facts constituted a reasonable effort to obtain Estrada's presence, nor that the prosecution's arrangement, at the time of preliminary hearing or otherwise, to keep in touch with Estrada and facilitate his appearance at trial was adequate. In fact, the record does not indicate that counsel was either consulted or had knowledge of the State's arrangements to obtain Estrada's appearance at trial.

Utah R. Evid. Rule 804 states: (a) *Criteria for being unavailable.* -- "A declarant is considered to be unavailable as a witness if the declarant: . . . (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance."[2] "The prosecutor explained that because both victims in this case were homeless and had no phones, they were difficult to locate and required "creative" efforts," explained the prosecutor at trial. R166:3-4; R167:16. "Accordingl, before the preliminary hearing, the prosecutor had used the Salt Lake City Bike Police to look for the men based largely on a description of Omar's missing earlobe. R166:3-4. Both men were found, (and) appeared at the hearing . . . ." St. Br. p. 7-8; R166:3-4. Why, if this method was successful the first time, was it not utilized to serve the subpoena or locate Estrada prior to trial? Using means, such as the Bike Police, are exactly the types of "conventional means" that would seem to be far

[2] The State inaccurately identifies the source of this portion of the rule as 804(b)(2). St. Br. p. 17.

more reliable the e-mailing an intermediary, particularly even before it was learned that Estrada was no longer incarcerated and the new pastor didn't know his whereabouts. And the fact that "(t)he prosecutor checked the jail twice more before trial," R166:4-5; St. Br. p. 9, hardly constitutes a herculean effort to locate the witness.

The State did not exercise all reasonable efforts to locate the witness. It simply relied upon the double hearsay that the new pastor, Jason, had been told by the old pastor, Russ, that he gave Mr. Estrada notice of the court date. R.166:4-5. That is at best desultory, done more for presentation at trial than actually attempting in good faith to locate the witness. With the knowledge that Estrada's testimony was already in place from preliminary hearing, laden with all the requisites for establishing the State's case, and the defense being saddled with the unfortunate result of its discovery questions on cross examination, with all due respect, the State had a significant disincentive to find this witness. If he didn't show up, no problem, his testimony was memorialized. This is not asserted to ascribe bad faith to the prosecution. But it is perhaps a factor underlying the prosecutor's perfunctory effort.

The State cites *State v. Garrido*, 2013 UT App 245, ¶17, for the proposition that the State used "reasonable means" to procure Estrada's attendance in this case. St. Br. 22. But *Garrido* presented quite a different factual basis than is present in this case:

> Victim persistently refused to testify prior to trial, was resistant to service, and was absent when called. The trial court made a finding that Victim was unavailable and asked that a stand-in witness come forward to read Victim's preliminary hearing testimony. Although Victim then suddenly appeared, she did so only to shout from the gallery that she would not be testifying. A bailiff went after her when she then fled the courtroom, but she had already disappeared. The trial court's statement—"I'm not going to continue with

> this charade. We're just going to take her testimony as it's written."—appears to be a simple affirmation of its prior, formal ruling of unavailability. But even if it was not, the "clear, uncontroverted" facts support a determination that she was not available to testify. See *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 16, 176 P.3d 476 (citations and internal quotation marks omitted). Victim was absent for all but a brief moment of the trial, during which she refused to take the stand and then fled. It was, therefore, not error for the court to determine Victim was unavailable because she "refus[ed] to testify" and was "absent from the hearing," and on that basis to admit her preliminary hearing testimony into evidence.

State v. Garrido, 2013 UT App 245, ¶ 17, 314 P.3d 1014, 1021. While affirming that a witness must be found unavailable, and clearly she made herself so under the facts of *Garrido*, that case has little, if anything, to do with the circumstances of the instant matter. A refusal to testify is not the same as being unable to locate a willing witness.

And notwithstanding the State's position, St.Br. p. 21, notice to the defendant is an integral part of the inquiry into whether the State acted reasonably under the circumstances. As the Massachusetts Supreme Court reasoned,

> The "good faith effort" requirement is most commonly at issue where unavailability stems from an inability to locate and procure the witness from outside the jurisdiction. But *the requirement applies to all cases of unavailability where there is some possibility that the witness may be produced.* See *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (*good faith requirement may apply where there is remote possibility that affirmative measures might produce witness*). Where a witness is unavailable due to illness or infirmity, *the "good faith effort" required of the Commonwealth is to promptly inform the court and the defendant of the unavailability of the witness once the Commonwealth learns of it,* so that they have an adequate opportunity to learn more about the witness's medical condition and to explore the alternative of a continuance or a deposition. Where the unavailability of the witness is not made known until the first day of trial, the defendant has little opportunity to investigate the witness's medical condition to challenge the prosecutor's claim of unavailability. At that juncture, ordering a continuance or

> scheduling a deposition might be impracticable, effectively denying the defendant the possibility of these alternatives.

Commonwealth v. Housewright, 470 Mass. 665, 671-72, 25 N.E.3d 273, 283 (2015)(emphasis added). The fact that *Housewright* deals with a different subject matter, a witness' illness rather than complete absence, does not make it irrelevant, as the State contends, St. Br. p. 21, to the question of whether the State provided timely notice of the absence of a witness to the court and opposing counsel, so that each could assess the situation and take such further measures as may have been warranted. Notice on the day of trial, when the State had substantial prior knowledge of its failure to obtain Estrada's appearance, was insufficient and unreasonable.

By analogy, notice is required under the residual exception to the hearsay rules:

> (a) In general. -- Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
> (2) it is offered as evidence of a material fact;
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> (4) admitting it will best serve the purposes of these rules and the interests of justice.
> (b) *Notice. -- The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.*

Utah R. Evid. Rule 807 (emphasis added). This Rule states, as a matter of policy, that *reasonable* notice should be required under circumstances virtually identical to those of the instant matter. Fair and timely notice was not given and defense counsel was clearly

taken by surprise, a factor which should be considered in evaluating her impromptu response as well as the court of appeals' affirmance of the witness' unavailability.

The court of appeals analysis, as well as the bulk of the issue of the prosecution proving witness unavailability, was scrutinized and Petitioner's position set forth in Petitioner's Opening Brief. Pet. Br. pp. 10-18. Petitioner will rely on the arguments set forth there at some length without further discourse. As to the materials contained in the Appendix and Petitioner's discussion, Pet.Br. pp. 29-30, a clarification is contained in Petitioner's Utah R. App. P., Rule 24(j) letter of October 31, 2016, a copy of which is included as Addendum A.

This Court should reverse the court of appeals affirmance of the trial court's finding that the witness, Gabriel Estrada, was "unavailable" to testify in person.

POINT II.

THE PRELIMINARY HEARING DID NOT PROVIDE GOINS AN ADEQUATE OPPORTUNITY FOR CROSS-EXAMINATION OF A WITNESS DEEMED UNAVAILABLE AT TRIAL WITH A MOTIVE SIMILAR TO THAT USED FOR TRIAL. PRELIMINARY HEARING TESTIMONY SHOULD NOT BE ADMITTED UNDER UTAH LAW AS A SUBSTITUTE FOR AN UNAVAILABLE WITNESS.

There is a clear distinction between trial and preliminary hearing. "The Confrontation Clause pertains to a criminal defendant's right to confront and cross-examine the witnesses against the defendant at trial; it does not afford the right to confront and cross-examine witnesses at a preliminary hearing, and *Crawford* does not alter the Court's previous holdings with respect to this matter." *State v. Rhinehart*, 2006 UT App 517, ¶ 14, 153 P.3d 830 referencing *Crawford v. Washington, supra.*

The State contends that Goins had the opportunity to cross-examine. An opportunity to cross-examine does not equate to having the same motive one would have at trial. The court of appeals found that *State v. Brooks, infra*, 638 P.2d 537 (Utah 1981), foreclosed Petitioner's argument with respect to motive. Br. St. 22 citing *Goins*, at ¶19. The trial court found that Goins enjoyed a meaningful opportunity for cross-examination at the preliminary hearing where his counsel actively examined Estrada without objection or restriction and asked about the "exact incidents" that were at issue at trial. R166:18-19; St. Br. 10.

Meaningful opportunity for cross-examination depends on the context. In reality it is rarely the same at preliminary hearing as it would be at trial. It is fair to say that Goins' counsel, engaging in discovery, would never at trial have asked most, if not all, of the questions she asked at the preliminary hearing, especially knowing the answers she obtained in her fishing expedition. That is undoubtedly why the questions were asked. So that such unfavorable answers could be avoided at the time of trial. Most of the questions had little or nothing to do with either probable cause or guilt or innocence. R.202:2-13. And the responses clearly tended to damage the Petitioner's image in the eyes of the jury.

At least the portions objected to should have been excised, i.e., most of the defense cross-examination, during which Estrada expressed, in somewhat veiled but manifest terms, his concern with respect to his apprehension of living with Goins. R.202:9-13. He either didn't care for the way he was treated or was concerned for the security of his property. R.202:10-13. He stated something "inaudible" about an incident which

occurred which caused him not to want to continue to live with Estrada. Id. His bike ended up missing and that's when he decided to quit Estrada's premises. Id. These matters tainted Mr. Goins image in the eyes of the jury, were highly prejudicial, and the trial court should have provided some means, even to extent of disregarding the whole of Estrada's cross-examination, of excising this unfavorable testimony.

A. THE MOTIVE TO CROSS-EXAMINE AT PRELIMINARY HEARINGS IS ENTIRELY DIFFERENT AND FRUSTRATES DEFENSE COUNSEL'S OPPORTUNITY FOR FULLY AND FAIRLY CROSS-EXAMINING A WITNESS WHO IS LATER DEEMED UNAVAILABLE AT TRIAL.

Petitioner objected at trial to Estrada's comments, which were somewhat veiled, about his experience with Mr. Goins. R.167:13. The objection went to Goin's testimony at preliminary hearing that, "I had an incident prior to . . . this going on now, and that's why I didn't stay there anymore;" that he moved out when his bike ended up missing, and he stayed at Goin's apartment, "but I don't like staying there that much." R.202:10, 12. Petitioner attempted to redact the offending material, but could not come to agreement with the State. R.167:8. The State argued that there was nothing to redact, that the testimony objected to was not character evidence, was subject to different interpretations, and harmless in any event. R.167:11, 12, 15.

The trial court ruled that it was not 404(b) character evidence. R.167 at 17. The trial court was incorrect. The evidence, if nothing else, went to Mr. Goin's character for truthfulness and honesty, central to his testimony in the case. "Prohibited uses. -- Evidence of a person's character or character trait is not admissible to prove that on a

particular occasion the person acted in conformity with the character or trait." Utah R. Evid. Rule 404.

One of the problems with allowing preliminary hearing testimony involves the question of redaction. As to possible redaction of unnecessary and likely prejudicial, certainly irrelevant, matters, when only a portion of former testimony is introduced, the result could be a distorted and inaccurate impression. That was clearly not a problem in the instant case and the "rule of completeness,"[3] which the State did not claim, did not, out of fairness to the opposing party, require introduction of the objectionable portions.

The very fact that the unfavorable evidence was developed by Petitioner's counsel at preliminary hearing while conducting discovery highlights the need to reevaluate the wholesale admission at trial of testimony taken with a dissimilar motive from that counsel would have at trial. True, the evidentiary rules provide for cross-examination at preliminary hearing:

> (1) Unless otherwise provided, a preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. *The defendant may also cross-examine adverse witnesses.*

Utah R. Crim. P. Rule 7 (emphasis added). But, of course, the examination is directly linked to the issue before the court:

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[3]"If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time." Utah R. Evid. Rule 106.

> (2) If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part.

Id. The State acknowledges that "where the State elects to present live testimony, defendants do have a rule-based right to cross-examine. Utah R. Crim. P. 7(i)(1)." St. Br. p. 33. It also notes "magistrates may only disregard or discredit evidence that is "wholly lacking and incapable of 'creating a reasonable inference regarding a portion of the prosecution's claim.' *State v. Virgin*, 2006 UT 29, ¶ 24, 137 P.3d 787, 793 (Sup.Ct.) quoting *State v. Talbot*, 972 P.2d 435 at 438 [quoting *State v. Pledger*, 896 P.2d 1226, 1229 (Utah 1995)].

The currently accepted preliminary hearing burden of proof is that applicable to an arrest warrant. "The question at the preliminary hearing is whether the prosecution has presented evidence sufficient to sustain 'probable cause.' This is the same standard that applies on review of an arrest warrant." *State v. Jones*, 2016 UT 4, ¶ 12, 365 P.3d 1212, 1215 (Sup.Ct.); *accord State v. Ramirez*, 2012 UT 59, P 9, 289 P.3d 444. "For more than a decade, we have recognized that the state's burden at a preliminary hearing is probable cause—the same evidentiary threshold it must meet to secure an arrest warrant." *State v. Schmidt*, 2015 UT 65, ¶ 17, 356 P.3d 1204, 1208 (Sup.Ct.). "Specifically, we see no principled basis for attempting to maintain a distinction between the arrest warrant probable cause standard and the preliminary hearing probable cause standard." *State v. Clark*, 2001 UT 9, ¶ 16, 20 P.3d 300, 305 (Sup.Ct.). "Magistrates must leave all the weighing of credible but conflicting evidence to the trier of fact and must 'view the

evidence in a light most favorable to the prosecution, resolving all inferences in favor of the prosecution." *State v. Droesbeke*, 2010 UT App 275, ¶ 18, 241 P.3d 772. "Under Utah's liberal bindover standard, a magistrate must view the evidence in the light most favorable to the prosecution. This means that when reasonable inferences from the evidence cut both for and against the state's case, the magistrate lacks discretion to choose between them and must leave such a determination to the fact-finder at trial." *State v. Schmidt, supra*, 2015 UT 65 at ¶ 1.

Thus, it is manifest that the scope of cross-examination is materially abridged at preliminary hearing. Statements from *State v. Talbot*, quoting *State v. Anderson*, 612 P.2d 778, 783 (Utah 1980)), are more than suspect, that "independently, the preliminary hearing acts as a discovery device advising the accused of the details of the charges and preserving favorable evidence." *State v. Talbot*, 972 P.2d at 438 (Utah Sup.Ct. 1998) quoting *State v. Anderson*, 612 P.2d at 784. As discussed, *infra, Anderson* has been largely abrogated by Utah Constitution Art. I, Sec. 12. Moreover, even cross-examination for the purpose of conducting limited discovery except presumably in aid of determining defendant's rights under Article I, Sections 12 and 13, is held to be prohibited by the amendment to the constitution abrogating *State v. Anderson*. See URE 1102, advisory note, discussed *infra*.

As a recent Court of Appeals decision pointed out, there is no longer a defense right of discovery:

> "The fundamental purpose served by the preliminary examination is the ferreting out of groundless and improvident prosecutions." *State v. Anderson*, 612 P.2d 778, 783 (Utah 1980), superseded on other grounds by

> constitutional amendment, Utah Const. art. I, § 12 (1995). Doing so "relieves the accused from the substantial degradation and expense incident to a modern criminal trial when the charges against him are unwarranted or the evidence insufficient." Id. at 784. *Historically, our courts viewed the preliminary hearing as serving secondarily as "a discovery device in which the defendant is not only informed of the nature of the State's case . . . but is provided a means by which he can discover and preserve favorable evidence." Id. However, a constitutional amendment eliminated this secondary purpose in 1995. That constitutional amendment declared that the function of the preliminary hearing "is limited to determining whether probable cause exists unless otherwise provided by statute." Utah Const. art. I, § 12. No statute provides otherwise.* Utah Code Ann. § 78A-2-220(1)(f) (LexisNexis 2012) (providing that a magistrate has the authority to conduct a preliminary examination "to determine probable cause"); see also *State v. Timmerman*, 2009 UT 58, ¶¶ 14-15, 218 P.3d 590; *State v. Arghittu*, 2015 UT App 22, ¶ 30, 343 P.3d 709. *Accordingly, the preliminary hearing's erstwhile primary purpose has become its sole purpose: determining whether probable cause exists.*

State v. Aleh, 2015 UT App 195, ¶ 14, 357 P.3d 12, 15-16. According to *Aleh*, not even limited discovery is allowable, and UT R. Crim. P., Rule 7 cross-examination must concern itself solely with the issue of probable cause, defined as no greater than the quantum of proof necessary for an arrest warrant. *State v. Jones, supra*, 2016 UT 4 at ¶ 12; *State v. Schmidt, supra*, 2015 UT 65 at ¶ 17; *State v. Clark, supra*, 2001 UT 9 at ¶ 16.

In the instant matter, Petitioner was allowed "entirely unfettered" cross-examination at preliminary hearing. St. Br. 44. But the motive, it should be obvious, was entirely inconsistent with a jury trial. At preliminary hearing the prospect of discovery motivates a defense lawyer to ask as many questions as possible to ferret out what a witness may say. Not so at trial. The opposite motive exists at trial, where the notion of conducting discovery is absurd. The old saw at trial is to "never ask a question to which you don't know the answer." Or as wise mentors often advise, regarding cross-

examination at trial, when in doubt, "DON'T." It cannot merely be taken as a given that the motive behind cross-examination is the same at preliminary hearing as it is at trial.

Petitioner's motive could not have been the same at preliminary hearing as at trial. He may have believed Estrada might be difficult to interview outside of the courtroom. So counsel was compelled to conduct such discovery as she could. She would have been derelict not to do so. This highlights the unfairness of a *per se* rule admitting preliminary hearing testimony at trial under virtually any and all circumstances where cross-examination is allowed or there was an opportunity to do so. It does not comport with counsel having a "full and fair opportunity" to cross, because the motives are invariably so diametrically opposed.

Defense counsel's explanation to the court of the fact that the motives to cross-examine at trial differs from that at trial, R.166:10, was unavailing. R.166:13. Though she stated the principle, counsel did not clearly indicate that her motive at preliminary hearing in cross-examining as she did was for discovery purposes. However, a fair reading of the full transcript of the testimony of Estrada, R.202:2-13, plainly demonstrates that counsel was engaging in discovery questioning that one would never have occasion to do at trial. Furthermore, the trial court simply assumed the motive was the same, not even having read the transcript. R.166:13. That is unfair. Had the court read the transcript, it would have been obvious that counsel was engaging in discovery and that it was not analogous to the motive one would have at trial.

B. THIS COURT SHOULD RE-EVALUATE AND EXCLUDE THE ADMISSION OF PRELIMINARY HEARING TESTIMONY EVEN UPON A SHOWING OF UNAVAILABILITY OF A WITNESS AT TRIAL.

Petitioner accepts the fact that the admission of preliminary hearing testimony has a long and storied history, both state and federal, as laid out in merciless detail in the State's Brief. St. Br. Point I, *passim*. But the proposition is not without controversy. "The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that "a primary interest secured by [the provision] is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). In short, the Clause envisions "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. "*Mattox v. United States*[4], 156 U.S. 237, at 242-243. "These means of testing accuracy are so important that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" *Ohio v. Roberts*, 448 U.S. at 63-64, 100 S. Ct. at 2537-38 (1980) quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), quoting *Berger v. California*, 393 U.S. 314, 315 (1969).

The State relies primarily on *State v. Brooks*, 638 P.2d 537 (Utah Sup.Ct. 1981), St Br. 12, 13, 15, 30, 31, 35, for its position that preliminary hearing testimony should be allowed. Contrary to the State's assertion, St. Br. p. 13, that Petitioner did not consider

[4] Reference to testimony before a "committing magistrate" in *Mattox* is dicta. The holding clearly involved "admitting to the jury the reporter's notes of the testimony of two witnesses at the former trial, who had since died." *Mattox v. United States*, 156 U.S. at 238, 15 S. Ct. at 338. Obviously, the same motive and issues were involved there.

Brooks in his initial brief, Goins addressed *State v. Brooks* at some length. Br. Pet., pp. 23-24, noting that the efficacy of *Brooks* is substantially diluted by the abrogation by *Crawford v. Washington* of the "reliability" test enunciated in *Ohio v. Roberts*. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford v. Washington*, 541 U.S. at 62, 124 S. Ct. at 1371. "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61, 124 S. Ct. at 1370.

The State also relies upon *Mackin v. State*[5], 2016 UT 47, (Sup.Ct.). St. Br. 30. There the defendant argued that the district court abused its discretion because its failure to grant his continuance to secure ex-girlfriend's presence at trial resulting in a violation of his Sixth Amendment confrontation rights. Id. ¶ 38. The Court in *Mackin* first glorified the Sixth Amendment which, "enshrines a criminal defendant's right "to be confronted with the witnesses against her." Id. It then noted that, "(w)hile the Sixth Amendment's plain text 'does not suggest any open-ended exceptions,' the United States Supreme Court held in *Crawford v. Washington* that the Sixth Amendment incorporates an exception to the confrontation requirement 'established at the time of the founding.'"

[5]Note the comparatively herculean efforts employed in *Mackin* to locate the missing witness. Id. ¶¶ 13-14.

541 U.S. at 54, 124 S. Ct. at 1365. Consequently, under *Crawford*, a declarant's pretrial testimonial statement satisfies the confrontation clause if (1) the declarant is "unavailable" at trial and (2) the defendant had a "prior opportunity" to cross-examine the declarant about the admitted statement. Id. at 59. It then approved the holding of the court of appeals in *State v. Garrido* that

> . . . "(I)t was the opportunity to cross-examine [the witness], not the actual undertaking of cross-examination, that satisfied the requirements of *Crawford*." Id. *Garrido* also aligns with this court's prior ruling in *State v. Menzies*, 889 P.2d 393 (Utah 1994), which explains that "[t]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Id. at 403 (citation omitted); see also *United States v. Owens*, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)."

Mackin, ¶¶ 38-39. *Menzies*, St. Br. 30, is, of course, another earlier case based in the *Roberts* "reliability" standard. Id. 402-03.

State v. Brooks, the State's bellwether case, is most on point as to the instant issue. Partially grounded in superseded federal and Utah authority, it states, in its most pertinent part,

> Defendants argue that by its very nature a preliminary hearing is different in motive and interest than a trial. They rely primarily upon *People v. Smith*, 198 Colo. 120, 597 P.2d 204 (1979), where the Colorado Supreme Court held that because of the limited scope of a preliminary hearing the state constitution precluded the admission of a preliminary hearing transcript at a subsequent trial. Defendants' arguments here are similar to those made in the Colorado case: The preliminary hearing is limited to a determination of probable cause as a screening device. The prosecution does not bear the burden of proving the crime "beyond a reasonable doubt" as in a trial. The evidentiary and procedural rules are relaxed. The credibility of the witnesses is usually not explored. Defense counsel does not have the same motive and interest to cross-examine at preliminary hearing as he does at trial.

> *The contrary is true. Defense counsel's motive and interest are the same in either setting; he acts in both situations in the interest of and motivated by establishing the innocence of his client. Therefore, cross-examination takes place at preliminary hearing and at trial under the same motive and interest.* Consequently, we hold that Rule 63(3)(b)(ii), Utah Rules of Evidence, does not preclude, as a matter of law, testimony given in a preliminary hearing from being admitted at trial.

State v. Brooks, 638 P.2d at 541(emphasis added).

Brooks is wrong. In addition to its questionable holding in light of *Crawford*, it was also decided in the shadow of *State v. Anderson*, 612 P.2d 778 (Utah Sup.Ct. 1980). *Anderson* was abrogated by the so-called victim's rights amendments made to Utah Const. Art. I, § 12, e.g., "To the extent that *State v. Anderson*, 612 P.2d 778 (Utah 1980), prohibited the use of hearsay evidence at preliminary examinations, that case has been abrogated." Utah R. Evid. Rule 1102 Advisory Committee Note.

But more importantly, Brooks' statement beginning with "the contrary is true," belies reality. As discussed above, defense attorneys do not approach or treat preliminary hearings as a trial. They rarely have a similar motive. And even if that were sometimes the case, at the very least, it should not be so determined without a full and fair hearing where the State has the burden of proof to demonstrate that a defendant had a similar motive. After all, that is the requirement in the event a criminal defendant wishes to introduce a prior statement. A criminal defendant seeking admission at trial of a statement from an unavailable witness previously subjected to cross-examination by the government, must demonstrate that the government had a "similar motive" to cross-examine. *United States v. Salerno*, 505 U.S. 317, 325, 112 S. Ct. 2503, 2509 (1992)

("We see no way to interpret the text of Rule 804(b)(1) to mean that defendants sometimes do not have to show "similar motive."). Many authorities have similar holdings: *United States v. Omar*, 104 F.3d 519 (1st Cir. 1997); *People v. Rice*, 166 Ill. 2d 35, 209 Ill. Dec. 635, 651 N.E.2d 1083 (1995); *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993). Why, if a criminal defendant must make a showing of similar motive and full and fair opportunity to cross-examine on the part of the state or federal government, one must ask, where the confrontation clause is at issue, should such a rule not be a requirement in the converse situation? It should not be merely presumed that a defendant's motive was the same, as reality informs otherwise.

The question is not answered by cataloguing all those cases which allow preliminary hearing testimony. St. Br. 23. The answer necessarily lies in analyzing Utah's particular provisions governing preliminary hearing and how those provisions accommodate a defendant's purpose and motive in cross-examining within the scope of those governing provisions.

Utah's "confrontation clause" and provision allowing for admission of hearsay and defining the limits of preliminary hearing is set forth as follows:

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, *to be confronted by the witnesses against him*, . . . Where the defendant is otherwise entitled to a preliminary examination, *the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence* as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause . . . .

Utah Const. Art. I, § 12 (emphasis added). Also see Utah R. Crim. P. Rule 7 ("At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.")

Coupled with Colo. R. Crim. P. 7, this is virtually identical to the constitutional provision upon which *People v. Fry*, 92 P.3d 970 (Colo. 2004), previously discussed, is based. See Br. Pet. 28-29. The Colorado Rule states,

> (3) . . . The defendant may cross-examine the prosecutor's witnesses and may introduce evidence. The prosecutor shall have the burden of establishing probable cause. The presiding judge at the preliminary hearing may temper the rules of evidence in the exercise of sound judicial discretion.

Colo. Crim. P. 7. The Colorado Constitution states as follows:

> In criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face . . . .

Colo. Const. Art. II, Section 16. Read together these provisions are virtually identical to the analogous provisions of Utah Const. Art. I, § 12 and UT R. Crim. P., Rule 7. The reasoning of *Fry* is based upon nearly identical constitutional/statutory provisions.

Nor is *Fry's* holding unique to Colorado. Due to the nature of prior proceedings and the diminished opportunity for meaningful cross-examination, many courts flatly refuse to allow preliminary hearing testimony to be introduced at trial. For example, the Supreme Court of Minnesota has stated in disallowing former testimony from a "Florence hearing,"[6]

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[6]A probable cause hearing: "A defendant may move for dismissal of the complaint for lack of probable cause that the defendant committed the offense charged, and this type of hearing 'has come to be called a *Florence* hearing based on the case of *State v. Florence*,

> If, as the court of appeals reasoned, the facts that the witness at the *Florence* hearing took an oath and was subject to cross-examination are enough to justify admission of *Florence* hearing testimony pursuant to the "catchall" exception, R. 804(b)(5), *then in effect R. 804(b)(1) has been silently amended by the court of appeals to allow the admission of Florence testimony as "former testimony.". . .as a practical matter cross-examination at a Florence hearing often is not the kind of cross-examination that occurs at trial*, id. at § 487 at 1091-94 (1980).

State v. Stallings, 478 N.W.2d 491, 495 (Minn. 1991)(emphasis added).

Other authorities hold either that a preliminary hearing cannot be a vessel for preserving testimony for the prosecution to later use at trial, or that a similar motive or opportunity cannot be demonstrated. For example, *State v. Elisondo*, 114 Idaho 412, 757 P.2d 675 (1988), in adopting a *per se* rule declining to allow admission of preliminary hearing testimony at trial, approved language from Justice Brennan's compelling dissent in *California v. Green*, 399 U.S. 149, 189, 90 S. Ct. 1930, 1951 (1970). "At a preliminary hearing the defense has little reason to cross-examine prosecution witnesses since "only television lawyers customarily demolish the prosecution in the magistrate's court." *Elisondo*, 757 P.2d at 677 (1988). The rule in *Elisondo* was subsequently superseded by statute. *State v. Richardson*, 156 Idaho 524, 530, 328 P.3d 504, 510 (2014).

Other authorities in accord with *Elisondo* include *Jones v. United States*, 483 A.2d 1149 (D.C. 1984) (cross-examination at grand jury not a substitute for opportunity to examine witness at trial); *People v. Torres*, 2012 IL 111302, 962 N.E.2d 919 (Cross-examination from preliminary hearing too uninformed to be admissible at trial); *People v. McCambry*, 218 Ill. App. 3d 996, 161 Ill. Dec. 578, 578 N.E.2d 1224 (1991)(after-

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306 Minn. 442, 239 N.W.2d 892 (1976).'"*State v. Ogris*, 2009 Minn. App. Unpub. LEXIS 1359, *6-7, 2009 WL 5088735 (Minn. Ct. App. Dec. 29, 2009).

acquired knowledge rendered meaningful preliminary hearing cross-examination inadmissible at trial); *State v. Williams*, 98-1201 (La. App. 4 Cir 11/18/1998), 727 So. 2d 1173 (even though cross-examination at suppression hearing was related to issue at trial, prior testimony not admissible); *Commonwealth v. Smith*, 436 Pa. Super. 277, 647 A.2d 907 (1994) (no full and fair opportunity to cross-examine at preliminary hearing); *Wisconsin v. Hale*, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637 (defendant entitled to cross-examination witness at trial); *Commonwealth v. Bazemore*, 531 Pa. 582, 614 A.2d 684 (1992) (no full and fair opportunity to cross-examine at preliminary hearing.)

For the reasons set forth herein and in Petitioner's Opening Brief, a "compelling reason," the State to the contrary, St. Br. 32-43, has been set forth to establish a bright line *per se* rule excluding preliminary hearing testimony as a substitute for in person confrontation at trial.

POINT III

THE COURT OF APPEALS "OVERLOOKED" AN ISSUE DUE TO THE FAULT OF COUNSEL. IT HAD THE AUTHORITY AND SHOULD HAVE ADDRESSED THE ISSUE RAISED ON NEW APPELLATE COUNSEL'S REQUEST FOR REHEARING AND REVERSED THE TRIAL COURT.

Petitioner does not claim that the court of appeals "misapprehended" an issue, as the State contends, St. Br. p. 14, 47, only that it was "overlooked" through no fault of its own. The first listed definition of "overlook" is "to fail to see or notice (something)." Merriam Webster, online version. The Court relies on counsel to bring matters of importance to its attention. Counsel failed to do so causing the court of appeals to "fail to notice" the issue. It is not claimed that the Ct. of Appeals "misapprehended" an issue,

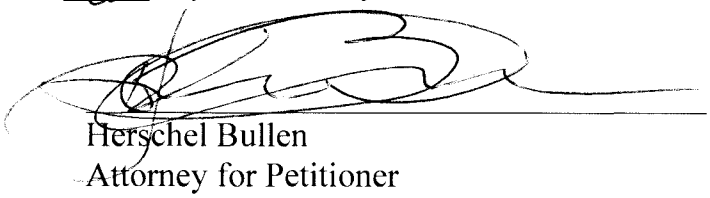
only that it was "overlooked" through no fault of its own. The Court relies on counsel to bring matters of importance to its attention. Counsel failed to do so causing the court of appeals to "fail to notice" the issue.

Further argument with respect to this point would belabor what is already set forth in Petitioner's opening brief. Petitioner relies upon the reasoning set forth therein without further reply to the State's arguments, which require no further counter argument.

CONLUSION

For the reasons set forth above, Petitioner requests this Court to reverse the decision of the court of appeals and remand the matter to the trial court for a new trial.

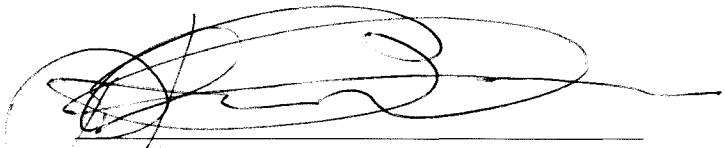
SUBMITTED this 10 day of February, 2017.



Herschel Bullen
Attorney for Petitioner

CERTIFICATE OF RULE 24 COMPLIANCE

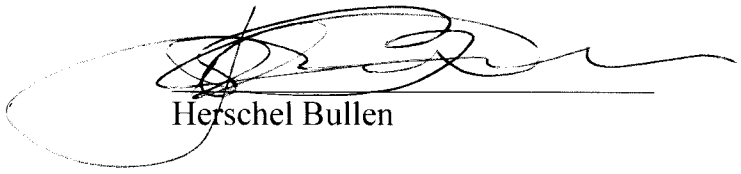
Appellant certifies pursuant to Rule 24(f)(1)(C) Utah R. App. P. that the foregoing Reply of Petitioner contains less than 7,000 words.



Herschel Bullen
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Herschel Bullen, hereby certify that I have caused to be hand-delivered an original and 10 copies of the foregoing to the Utah Court of Appeals and a searchable pdf CD, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 2 copies along with a searchable pdf CD mailed by United States Mail, postage pre-paid, to KRIS C. LEONARD, Esq., Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 10 day of February, 2017.



Herschel Bullen

ADDENDUM A

HERSCHEL BULLEN
Attorney at Law
369 East 900 South #302
Salt Lake City, Utah 84111

October 31, 2016

Acting Clerk of Court
Utah Supreme Court
450 South State St.
P.O. Box 1410210
Salt Lake City, Utah 84114

Re: State v. Desean Goins, Case No. 20160485-SC
Utah R. App. P. 24(j) Supplemental Authority Letter

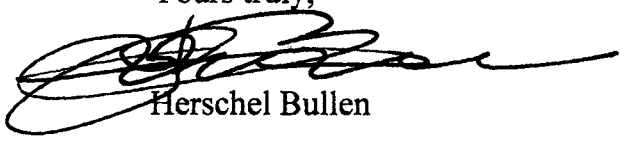
Dear Acting Clerk,

The Opening Brief of Appellant/Petitioner was filed on October 26, 2016. Counsel for Appellant has subsequently come into possession of certain authority which further explains certain information to which reference is made on pages 29-30 of the Opening Brief. The underlying data which is referenced in the Brief is contained in the separately bound and filed Appendix.

Because there remained some question in counsel's mind as to whether the data in the Appendix accurately reflected what was initially indicated by Utah Courts Data Services with respect to the number of preliminary hearings actually "held" during the year 2015, counsel requested a clarification. That clarification is contained in the attached e-mail dated October 27, 2016, from Utah Courts Data Services in response to my query of even date. The responsive e-mail should be read in conjunction with the explanatory e-mail included as the first page of the Appendix.

Thank you for distributing this letter to the Court.

Yours truly,



Herschel Bullen

Copy:
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herschel bullen <herschellaw@gmail.com> Oct 27 (1 day ago)

to courtdatareque.

Is information collected with regard to whether the preliminary hearing was waived at the time it was set. Or that it was held and evidence was presented. If those figures, prelim held vs. prelim waived, for 2015, that would be very helpful.

Please advise. I understand there will be a charge for information provided. Thank you.

Oct 27 (1 day ago)

courtdatarequest

to me

Mr. Bullen,

Column E states the date that the Preliminary Hearing was cancelled. Sometimes, that is the same day the Preliminary Hearing was set for - for example, case number 041100402 shows the preliminary hearing was cancelled on October 15, the same date that it was supposed to be held (as shown in column F).

We do not aggregate data showing what happened in a particular hearing. You can find more detailed information about any particular case using Xchange.

Thank you,
Court Services